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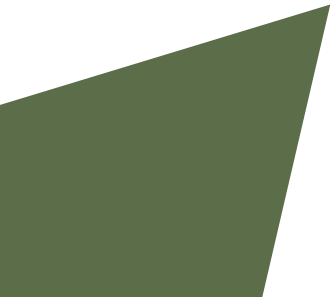
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Elucidating the legal countenance of Surrogacy

Manvendra Verma

ABSTRACT

In this work, the author contemplates an analysis to give light over the different face of surrogacy law in India. In doing so, the author firstly defines surrogacy and briefly discusses the Indian surrogacy law and how the need for making a law to regulate surrogacy develops, thereafter the author discusses Surrogacy (Regulation) Bill, 2019. Subsequently, the author gives light over the amended bill termed Surrogacy (Regulation) Bill, 2020. The author winds up by discussing how this new bill is wrangle to constitutional law and suggests reforming action. However, the paper does not endure into giving specific exposure to any single sub-issue, but at the same time, the author has attempted to suggest certain menoeuvrs in the regime.

Keywords: Surrogacy, surrogacy law, Surrogacy (Regulations) Bill, 2019.

INTRODUCTION

"Naasti Matrusabha Prabhab" implies there is no another life-giver than a mother in this world. Motherhood is a boon, but some women deprived of such a godsend. So, against such deprivation women opt for alternative i.e. Surrogacy. It is an alternative to rejoice motherhood for the infertile mother. Surrogacy can be interpreted as a contract/an agreement/a method by which one member of the gentle sex consents to hold up the pregnancy of another person who will become the newborn child's parent(s). But, it is very difficult to construct one live definition, which could be effortlessly understood by a layman. The ambiguity is more arduous then it is seen and may such question unfold when we practice, walk casually through the legal path of surrogacy as praxis.

According to the Black's Law Dictionary, Surrogacy implies the method of carrying and delivering a child for another person. The New Encyclopedia of Britannica expounds "Surrogate mother " as the approach in which women bear a child for a couple unable to produce children in the usual way. The Report(legwork) of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984) defines Surrogacy as the method whereby one woman holds the baby in her womb for another with the intention that the child should be handed over after birth.¹

Surrogacy is in no way a unique science concept or something medically recent, which is bewildering the legal front of the nation, it rather is a very aged practice which, in some countries, has gained the status of a fully-accepted custom. However the legal anterior of this is faced with numerous contemporary challenges. Babylonian law and custom authorized this method and an infertile woman could adopt the practice to avoid a divorce, which would otherwise be inexorable.² In the biblical book of Genesis, it is described that using the conventional method of sexual intercourse, Abraham and Sarah had a child through her servant Hagar (Gen. 16:1-4). The surrogacy did not turn out well, and this biblical story immediately raised questioned about then moral wisdom of this method. So to draw from it the intelligentsia of this back then related it to sexual nihilism in some way or the other, some to extend it.

¹ Marry Warnock & the committee of Inquiry into Human Fertilisation and Embryology, *The Warnock Report on Human Fertilisation and Embryology*, 10 JOURNAL OF ADVANCED NURSING, 375-384(1985).

² Postage & JN, EARLY MESOPOTAMIA SOCIETY AND ECONOMY AT THE DAWN OF HISTORY, 105(1992).

SURROGACY LAW IN INDIA

Law governing surrogacy assumes great primacy in India because India has often been termed as the 'surrogacy capital of the world'. Initial to 2008, surrogacy (essentially commercial) was being briskly carried out in India without any endeavors by the Government to set up a statutory regulatory mechanism. The Indian Council for Medical Research (ICMR) formulated particular Guidelines in 2005. Nonetheless, these Guidelines did not have any statutory footing, and surrogacy remained to persist as an unchartered territory in the Indian legal landscape.

The swiveling point came in the year 2008 when the Supreme Court was called upon to handle an issue revolving around surrogacy. The case of *Baby Manji Yamda v. Union of India* merely pertained to attaining travel documents for a baby with Japanese parents conceived and born in India through commercial surrogacy. Yet the issue of the legality of commercial surrogacy under Indian law was not elevated, the Supreme Court made a remark that commercial surrogacy is legal in India.

The juncture of the judge concurred with the formulation of the Assisted Reproductive Technology (Regulation) Bill, 2008. Woefully, no efforts were taken to table the Bill of 2008 before Parliament. So after several abortive attempts, the government passed a bill termed as Surrogacy (Regulation) Bill, 2019.³

AN ESSENTIAL COMPONENT TO ASSESS PRIOR TO LEGISLATION (CONSIDERATIONS)

It is crucial to recognize be a numerous method that needs to be noticeable upon when the process of legal formalization takes place. Any legislation, guidelines, rules, and regulations governing surrogacy, specifically in India, requires to have particular elements. These elements are based on:-

1. What are the inadequacies which exist, and
2. What are the specific areas that may suppose distress to the affected and the judiciary of the nation when the clock strikes.

³ Sharma, C, *Surrogacy Laws In India – Past Experiences And Emerging Facets*, BAR AND BENCH - INDIAN LEGAL SERVICES (April 23,2020, 10:35PM), <https://www.barandbench.com/columns/surrogacy-laws-in-india-past-experiences-and-emerging-facets>.

This entire agreement contains multiples stakeholders. The leading ones being the commissioning parent, surrogate mother, the surrogacy clinics, and the child. Each stakeholder is intensely disturbed by any legislation and guidelines of the government. Thus, the guidelines and legislation require to be comprehensive to incorporate every single issue:-

1. This right and responsibility, all kind, financial, contractual and others, of the commissioning parent,
2. The limitations and rules to govern the functioning of the procedure by the practicing clinics.
3. The obligation and right of the clinics and medical practitioners to deter it from becoming an abusive trade,
4. The right of the surrogate mother (monetary & contractual) and legal boundation that must be set on her (evolving out of the judicial history of a case such as the *Baby M case*⁴), and
5. The right of the newborn under the surrogacy arrangement and his legal ability. The function of the state in providing individuals and family's entry to reproductive technologies is also a significant component to be discerned by way of legislation and guidelines.

Following significant determination which is not given enough priority is, determining - "who" can be assisted and "why not" the other. The significance of these questions is evident from the fact that, the nature of the other law and basic rights of a citizen, in a nation can effortlessly be challenged, established on the answer to these concerns. This concern is more about how we treat questionable citizens like unmarried women/men, LGBTQ+ communities. Also, what role should religious morality play in the utilization of these assisted reproductive technologies.⁵

The behavior of the right of the child given drift to a trail of another arduous issue as recognized in the case, *Jayee B. v. Superior court*.⁶ A Child was born to a surrogate mother using sperm and egg from unidentified donors because the infertile couple was powerless to create this own embryo employing the in vitro fertilization techniques. The couple decided to use unidentified donor instead asking the surrogate to employ her own egg because of the Baby M case in New Jersey in which the surrogacy had ultimately refused to hand over the baby M case in New Jersey in which

⁴ In re Baby M, 537 A.2d 1227; 109N.J. 396 (N.J. 1988).

⁵FRANCE WINDDACE TWINE, OUTSOURCING THE WOMB: RACE,CLASS AND GESTATIONAL SURROGACY IN A GLOBAL MARKET,3 (2015).

⁶ Jayee B vs. Superior Court, 42 Cal. App. 4th 718 (1996).

the surrogacy had she was its biological mother and her right the child pre-empted that of the commissioning parents. The child accordingly had five people who could by a lawsuit for parenthood- a genetic mother, a commissioning mother, a surrogacy, a genetic father, and a commissioning father. The case further unfurled strangely due to the divergence of the intended parents and become a new legal battle altogether.

India specifically, has to be very cautious as it has developed as the herm for "fertility tourism and has to count as the poverty and prevented nation of the women, who enter into the consensus to become a surrogate mother while drafting anything. The status of Indian Judicial precedent on the subject was originally marked by the *Baby Manjhi case*⁷, wherein commercial surrogacy was given an okay signal by the Supreme Court.

Commoditization of a lady's womb and the newborn child & psychological consideration was a major criticism that surrogacy was given on a moral grounding. Incidentally of the legal and Constitutional footing of the concept, **Article 16.1** of the **Universal Declaration of Human Rights (1948)** affirms inter alia, that "men and women of full dotage without any limitation due to race, nationality or religion have the right to marry and set up a family".⁸ In India, Courts has declared the reproductive right of humans as a natural right. For instance, *B.K. Parthasarathi v. Government of Andhra Pradesh*⁹, the Andhra Pradesh High Court in *Jack T. Skinner v. State of Oklahoma*¹⁰, which portrayed the right to reproductive right gets constitutional immunity, surrogacy which enables an infertile couple to exercise that right also get the same constitutional protections.

SURROGACY BILL, 2019

The surrogacy law in India in the existing form of the Bill of 2019 contains a few significant facets. The major overhaul appears in the form of a complete prohibition on commercial surrogacy. This Bill also envisages embargo on foreign nationals from benefiting surrogacy services.

Commercial surrogacy has been anticipated to be the root cause of all evil that afflicts surrogacy in India. Therefore, the Statement of Objects and Reasons accompanying the Bill of 2019 highlights that the legislation aims to impede the sinful practices surrounding commercial

⁷ Baby Manji Yamada vs. Union of India and Another (2008) 13 SCC 518 and In the Matter of Baby M, 217 N.J. Super 313, (1987).

⁸ See https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf.

⁹ B.K. Parthasarathi v. Government of Andhra Pradesh, AIR 2000 A.P. 156 (India).

¹⁰ Jack T. Skinner v. State of Oklahoma, 316 U.S. 535 (1942).

surrogacy including the exploitation of surrogate mothers. In doing so, the recommendation of the Law Commission to forbid commercial surrogacy has been carried out and on this point, the Bill of 2019 makes a deviation from the Bills of 2008 and 2014 which permitted commercial surrogacy.¹¹

CHARACTERISTIC OF SURROGACY(REGULATION) BILL, 2019

- 1) This bill furnished the constitution for surrogacy boards at the national as well as state levels to assure effective regulation.
- 2) This bill strives to license ethical altruistic surrogacy to the intending infertile Indian married couple between the age of 23-50 years for females and 26-55 years for a male. This bounded to only Indian couples who have been lawfully married for at least 5 years would be authorized to opt for surrogacy.
- 3) This necessitates for the couple to obtain a certificate of essentiality and also a certificate of eligibility before pursuing surrogacy. It also defines that hoping couples should not relinquish the child born out of surrogacy under any circumstance. This also stipulates a separate eligibility norm for the surrogate mother.
- 4) The surrogate must be a kin of the intending couple and be a married woman having a child of her own. She should be between the age of 25-35 years, not have been surrogate previously, and must be certifiably mentally and physically fit.
- 5) On the legitimate status of a surrogate child, the Bill asserts that any child born out of a surrogacy method shall be the biological child of the intending couple. The newborn child shall be capacitated to all rights and privileges that are available to a natural child.
- 6) The Bill also attempts to supervise the functioning of surrogacy clinics. All surrogacy clinics in the country require to be registered by the ethical authority in order to undertake surrogacy or its related procedures.
- 7) The Bill provides for several safeguards for surrogate mothers. Each mother was insulated for some time to cover not only for a period of pregnancy but after that also. This also conveys that no sex preference can be performed when it succeeds in surrogacy.¹²

¹¹ I Sinha, *Is The Surrogacy Bill Regressive?*, INDIA TODAY, (May 05, 2020; 9:49 PM), Available at: <https://www.indiatoday.in/india-today-insight/story/surrogacy-bill-2019-whose-womb-is-it-1595195-2019-09-04>.

¹² Agrawal, S. and Garg, L., 2016. The New Surrogacy Law In India Fails To Balance Regulation And Rights. [online] LSE Human Rights. Available at: <<https://blogs.lse.ac.uk/humanrights/2016/11/23/the-new-surrogacy-law-in-india-fails-to-balance-regulation-and-rights/>> [Accessed 10 April 2020].

SURROGACY (REGULATION) BILL, 2020

The amended bill is the amelioration of the draft legislation which was approved by Lok Sabha in August 2019 but its prerequisites, including that only a close relative of a couple can be a surrogate mother, had tempted criticism. The bill embodies all recommendations made by a Rajya Sabha select committee, which studied an earlier edition of the draft legislation and is intended for banning commercial surrogacy and allowing altruistic surrogacy.

KEY ASPECTS OF THE BILL

- 1) It allows any “willing” woman to be a surrogate mother and recommends that widows and divorced women can also benefit from its provisions, besides infertile Indian couples.
- 2) The bill also endorses supervising surrogacy by establishing a National Surrogacy Board at the central level and, State Surrogacy Board and suitable administrations in states and Union Territories respectively.
- 3) The proposed insurance safeguard for surrogate mothers has now risen to 36 months from 16 months provided in the earlier version.
- 4) Commercial surrogacy will be forbidden including the sale and purchase of human embryos and gametes.
- 5) Ethical surrogacy to Indian married couples, Indian-origin married couples and Indian single women (only widow or divorcee between the age of 35 and 45 years) will be permitted on the fulfillment of certain conditions.

LAWS GOVERNING SURROGACY IN DIFFERENT COUNTRIES

While nations like, the United Kingdom, the United States of America, Australia, the Netherlands, and Denmark are those where altruistic surrogacies is legal, countries such as France, Germany, Italy, Spain, Portugal, and Bulgaria outlaw all kinds of surrogacy.

Armenia, Georgia, Kazakhstan, Russia, Ukraine authorize both altruistic and commercial surrogacy. Kenya, Malaysia, and Nigeria do not restrict surrogacy but have no formal law to govern the practice. The Czech Republic, Colombia, Chile, and Hungary are countries, which have unregulated surrogacy management.

- 1) **In Britain:-** Commercial Surrogacy is forbidden in the United Kingdom. The surrogate is the child's legal parent at birth. Legal parenthood can be switched by parental order or adoption only once the child is born.
- 2) **In the United States of America:-** Surrogacy laws vary from country to country. Surrogacy friendly nations allow both commercial and altruistic surrogacy. Arkansas, California, and New Hampshire are surrogacy friendly. New York restricts commercial surrogacy and Michigan forbids absolutely all surrogacy agreements.
- 3) **In Canada:-** Canada's Assisted Human Reproduction Act approves only altruistic surrogacy. Surrogate mothers may be compensated only for approved expenses. However, all surrogacy arrangements are unlawful in Quebec in Canada

ADVANCED ARGUMENT

- **Jeopardize to the privacy of the couple.**

In preference to accumulating of diagnosis report and doctor-prescription, the bill exacts a burden on the couple to compulsorily come up with a "**Certificate of Infertility**" from the appropriate authority. Consequently, this certificate causes stigma attached to infertility in India, where couples never feel secure disclosing such personal details. Accordingly this infringes the **Right to Privacy**. As **J DY Chandrachud** held in case of *Justice KS Puttaswamy v. Union of India*¹³, Privacy is concomitant of the right of individuals to exercise control over his or her personality. Privacy, the constitution's heart of human prestige, is constitutionally protected right which occurs initially from the guarantee of life and personal liberty in Article 21 of the constitution. Consequently, this bill provokes an infringement of the Right to privacy of the said couples.

- **Bill provokes inequality and promotes class constitution.**

As bill permits only a limited portion from the women community to act as surrogate mothers. Section 4(iii)(b) of the Surrogacy (Regulation) Bill, 2019 states

¹³ Justice KS Puttaswamy v. Union of India, AIR 2017 SC 4161.

"no person other than a close relative can qualify for surrogate mother for the intending couple.¹⁴

By specifying a category for being a surrogate mother legislature has promoted class legislation. While performing so, **Article 14** of the constitution has been infringed, because an aforesaid provision of bill does not equal protection of the law as guaranteed. Under the law of law, a Test of Reasonable Classification conducted to test the validity in which it was seen inevitably (necessarily) the existence of nexus between the basis of classification and the object of the bill which makes classification. As the motive of the bill is to conserve from the exploitation of surrogate mother and child born from commercial surrogacy, so said bill put a ban on it. And the basis of classification is arbitrary because, it allows only close relative women of the married couple, where a wife is infertile.

The bill prohibits limited and conditional surrogacy merely to married Indian couples and further disqualification of other persons based on their nationality sexual orientation, material status, and age. Therefore, this shall not stand the equality text or the text of reasonable classification under **Article 14**.

- **Eulogy of Rational Limitation.**

The eligibility terms under the bill amount to an irrational limitation on the reproduction right of a married Indian couple, which violative of **Article 21** of the constitution. Firstly, In *Suchitra Shrivastava v. Chandigarh Administration*¹⁵, the Apex Court discerns, in view of this women's right to privacy, dignity and bodily integrity should be respected. Therefore, the court held personal liberty in **Article 21**, includes the right to make a reproductive choice (to promote child or not to produce), and there should be no restriction on the exercise of a reproductive choice she can even refuse to participate in sexual acts. Therefore, it is discernible that if Indian married wife 25-35 year aged wills to opt for surrogacy instead of giving birth by herself, then her will must be respected. Likewise, the restricted categories should also be allowed to opt for surrogacy. The said bill restricted these categories by employing *parents partriae* doctrine.

- **Statue challenges the law of adoption in India.**

¹⁴ THE SURROGACY (REGULATION) BILL 2019 S.4(iii)(b).

¹⁵ Suchitra Shrivastava v. Chandigarh Administration, AIR 2017 SC 2967.

The Bill contradicts the law of adoption India, Sec 7&8 of Hindu Adoption & Maintenance Act, 1959, and section 57 of the Juvenile Justice Act, 2015, allows conditional adoption for the Single and divorced parents. But the appearance of the above said this got violated because no single or divorced parents opt for surrogacy which was earlier often ordinary and any person of such category can get a child by the practice of surrogacy.

- **Miscellaneous: -**

In addition to all the above argued, this bill bluntly ignores the fact that the women who opt for being surrogate mothers are from the economically vulnerable backgrounds and for them, surrogacy is a source of livelihood. A total prohibition on commercial surrogacy denies them of their livelihood and rather, expects them to undergo reproductive labour without any compensation. And the bill is complete silence on the part of those women who were already in the agreement and had another life in her womb which got out after few months, in result now they both are worth for nothing women are not getting money from the other party nor there is someone who earns for their livelihood and the newborn baby, who took birth because of some agreement which now void, is now unclaimed. Presently, no one is agreed to take responsibility for neither our government, not society.

CONCLUSION

The surrogacy (Regulation) Bill, 2019 cement the ban on commercial surrogacy, but it falls to effectively tackle the large social, physical, psychological, emotional, and economic issues that continue to challenge the welfare and safety of both the surrogate mother and the child. Just the removal of the commercial element in the current surrogacy structure does not eliminate the chance of exploitation. So the right of surrogate mother and child born must comprehensively be formulated, along with that ART must be regulated thoroughly. Accordingly, a good law is a by-product, which occurs on compliance of legislation with Part III of the Constitution. And legislation should always erect on the footing of *Just Naturale*.